

WALTER D. SULLIVAN COMPANY, INC.
MECHANICAL CONTRACTORS
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House Bill 5328
General Law Committee
Public Hearing -- March 3, 2016

TO: MEMBERS OF THE GENERAL LAW COMMITTEE
FROM: WILLIAM A. COSCARELLI, PRESIDENT, WALTER D. SULLIVAN CO., INC.

PLEASE SUPPORT HOUSE BILL NO 5328 -- AN ACT CONCERNING PUBLIC WORK CONTRACT RETAINAGE AND ENFORCEMENT OF THE RIGHT TO PAYMENT ON A BOND

My name is William A. Coscarelli. I am President of Walter D. Sullivan Co., Inc., located in New Britain, Connecticut. Our firm has been in business for over 90 years and regularly provides mechanical services on state and municipal construction projects in Connecticut. I also am a member of the Board of Directors of the Connecticut Subcontractors Association (CSA), whose members include over forty firms that employ thousands of workers on public construction projects. Our firm employs 68 workers.

Our firm, the CSA, and all of the subcontracting firms I know strongly support the passage of House Bill No. 5328, An Act Concerning Public Work Contract Retainage and Enforcement of the Right to Payment on a Bond.

Section 1 of HB 5328 amends Connecticut General Statutes section 49-41b(1) to allow the State DAS, or other state agencies, to hold back 5% in retainage for work performed and accepted in state construction contracts. The current law allows the State to hold back 10% retainage. Please note retainage is money that has been earned and approved for work that contractors have already performed. Contractors and subcontractors are forced to wait until the job is completely finished before we get paid for work we have performed, which can be as long as one to two years from the start of the project. Oftentimes, this means that the contractors are funding a State construction project with millions of dollars in labor and materials that we have provided and paid for many months before.

All public construction projects require performance and payment bonds to ensure both completion of the work and payment of all subcontractors and suppliers. This fully protects the State when contractors fail to complete their work or pay their subs and suppliers. Excessive retainage is totally duplicative and unnecessary for either purpose. The State does not pay its contractors for work that has not been properly performed or completed—nor should it. But there is no valid reason for the State to withhold excessive retainage for work that has been properly performed, and has been accepted and approved for payment!

The primary benefit of decreasing retainage to 5% on State projects will enable our construction businesses to have more available funds to pay our bills, expand our payrolls, purchase new

equipment, and continue to modernize our businesses to meet the increasing complexity of construction projects. Contractors must pay for all labor and materials expended on state projects in real time as these costs are incurred. It is grossly unfair to require contractors to finance state construction projects by waiting until the end of a project to be paid for work that was accepted by the owner one or more years earlier. Reducing retainage also will eliminate a strong disincentive for many contractors from bidding on state construction projects.

The current 10% retainage is out of step with the longstanding provisions elsewhere in the statute: Retainage for CDOT is 2.5%; it is 5% on municipal projects. Please note also that retainage on most private projects is limited to 5% as well, per Conn. Gen. Stat. section 42-158k. These lower limits create no notable problems for CDOT, cities and towns, or private owners. The State should pay its contractors at least as promptly as CDOT, or towns and cities, or as private owners are required to do. The 10% retainage for state projects is also out-of-step with nearly all of the other eastern states. Most of our neighboring states permit only the lower 5% retainage amounts, including MA, NY, RI, NJ, ME, DE, VA, NC, & SC.

Section 2 of HB 5328 amends Conn. Gen. Stat. section 49-42(a) to allow a subcontractor or supplier on a public construction project to collect reasonable attorneys fees and costs if the payment bond surety does not respond to a subcontractor/vendor claim for payment in the time frames already required by the statute, and the claimant must collect payment in a lawsuit. (The statute requires sureties to “pay or deny claims,” in whole or in part, within ninety days.) The current proposal provides an enforcement mechanism for the time requirements already set forth in the statute.

The language for this proposal is copied *verbatim* from the American Institute of Architects (AIA) Payment Bond A312 (par. 7.3) for awarding attorney’s fees. (Note: the proposal also provides for reasonable “costs” as well.) This AIA Payment Bond form is widely used in most private, and many municipal construction projects across the nation and in Connecticut. The same language should be applied to all public building projects in our State.

Please note that the fundamental rationale for requiring a payment bond on public construction projects under Conn. Gen. Stat. section 49-41 is to guarantee prompt payment to the subcontractors and vendors who perform the work and provide the materials for public construction projects. This proposal advances the underlying purpose of that statute.

Presently, a payment bond surety can wait until the eve of trial to pay a valid claim to a subcontractor or supplier who has been owed money for quite some time. Faced with having to spend attorney’s fees to sue a surety, many claimants simply settle a valid claim for cents on the dollar from the surety. This is

very unfair, and completely undercuts the fundamental purpose of the payment bond statute, which is to ensure prompt, fair payment of unpaid subs and suppliers.

Thanks very much for your support of HB 5328.

Respectfully submitted,

WALTER D. SULLIVAN CO., INC.

William A. Coscarelli

William A. Coscarelli, President